

1990

James Constructors, Inc v. Salt Lake City Corporation : Salt Lake City Corporation, a municipal corporation of the State of Utah v. James Constructors, Inc., a Nevada corporation, Hood Corporation, a California corporation, and Industrial Indemnity Company, a California corporation : Brief in Opposition to Petition for Writ of Certiorari

Utah Supreme Court

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900102

IN THE SUPREME COURT OF UTAH

JAMES CONSTRUCTORS, INC.,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

SALT LAKE CITY CORPORATION,
a municipal corporation of
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,
a Nevada corporation, HOOD
CORPORATION, a California
corporation, and INDUSTRIAL
INDEMNITY COMPANY, a
California corporation,

Defendants.

Supreme Court No. 900102
Priority No. 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brief in Opposition to Petition for Review of
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Judgment of Third District Court of Salt Lake CountyBryce E. Roe, Esq.
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APR 11 1990

Clerk, Supreme Court, Utah

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QUESTIONS PRESENTED FOR REVIEW

1. Do Special and Important Reasons Exist which Warrant Review by this Court of the Decision of the Utah Court of Appeals Interpreting the Written Contract Between James Constructors ("James") and Salt Lake City Corporation ("SLCC") ?

2. Did the Court of Appeals Consider All of the Relevant and Primary Points Presented on Appeal ?

3. Was the Decision of the Court of Appeals in Accord with the Decisions of this Court ?

REFERENCES TO REPORTS OF OPINIONS BY THE COURT OF APPEALS

The opinion of the Court of Appeals was not issued for publication and has not been reported.

JURISDICTION

James Constructors asserts jurisdiction under Utah Code Ann., Section 78-2-2(5), (1953 as amended).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ETC.

There are no constitutional provisions, statutes, or rules, which are determinative of the issues involved in this case.

STATEMENT OF THE CASE

Nature of the Case

This case involves a contract between SLCC and James for the construction of a public water pipeline construction project known as the Big Cottonwood Conduit Extension-Terminal Park Transmission Pipeline ("The Project"). SLCC and James both filed separate actions against each other, which actions were subsequently consolidated. SLCC seeks to recover in excess of \$2,000,000.00 for

the costs of correcting defects in the work performed by James.

SLCC claims that James, inter alia, failed to properly bed and support the pipe, failed to remove oversized rocks, asphalt and other debris from the backfill which resulted in damage to the pipe, and failed to properly backfill and compact the trench. SLCC further contends that James' workers were instructed to conceal defective work from SLCC and to change its construction methods when SLCC personnel were on the jobsite. James contends that the defects were SLCC's responsibility and seeks in its Complaint to recover damages for "extras" consisting of delay, construction sequence changes, standby time, remedial work and lost profits.

Course of Proceedings and Disposition by Trial Court

On April 11, 1988, the District Court heard arguments on SLCC's Motion for Partial Summary Judgment with respect to (1) James' claims for alleged extra work consisting of alleged delay, standby time, construction sequence changes, and remedial work; and (2) interpretation of the contract relating to responsibility for bedding and backfill material and inspection of the project. (R.616). On May 4, 1988, the District Court entered Partial Summary Judgment in favor of SLCC on all the above issues. (R.952).

The entire claim alleged in the Complaint of James, which James terms as "extra work", consists solely of claims for delay, stand-by time, construction sequence changes, repair of defects in its work, and lost profits. (R.2; R. 1033; R. 573-609). The District Court separately addressed each of the items making up James' extra work claim, i.e., delay, stand-by time, construction

sequence changes, repair of defects and lost profits, and ruled that James was not entitled to recover for any of these items under the Contract. (R. 954). The District Court ruled that James was not entitled to recovery on its extra work claim because there were no written extra work orders as required by the Contract. (R. 954).

On May 17, 1988, the Court entered an Order of Final Judgment pursuant to 54(b), Utah Rules of Civil Procedure. (R. 962). James filed its Notice of Appeal on June 20, 1988. (R. 996). This Petition was denied by the Supreme Court on July 27, 1988. The case was then referred to the Court of Appeals pursuant to Rule 4A(a) of the Utah Supreme Court.

The Court of Appeals affirmed the Partial Summary Judgment and filed its written Opinion on January 19, 1990. James then filed a Petition for Rehearing which was denied on February 15, 1990. On March 9, 1990, James filed this Petition for Writ of Certiorari.

STATEMENT OF UNDISPUTED FACTS

Facts Presented to District Court

On July 8, 1983, James contracted with SLCC to construct a public water pipeline along the East bench of Salt Lake City. (R. 538). During prosecution of the work by James on the Project SLCC discovered and notified James of defects in the project, including excessive settlement of the trench, and requested James to remedy these defects. (R. 513). In March and April of 1984, SLCC notified James that it would be terminated from the Project if the defects were not corrected. James did not comply with the demand for corrections. (R. 513). On or about April 16, 1984, SLCC

notified James that it was terminated from the Project inasmuch as the defects had not yet been corrected. (R. 513).

James bases its entire claim solely upon claim letters submitted to SLCC after defects were discovered in James' work. (R. 610). The entire claim of James is for specific items it considers as "extra work" consisting of delay damages, stand-by time, construction sequence changes and work repairing defects in James' work. (R. 2, 610). The amount James claims for lost profits is included in the above amounts. (R. 612). James has made no claims for damages other than these specific items. (R. 610). James was paid in full by SLCC for all written extra work orders issued on the Project. (R. 610).

James contends that the failures and defects in the project resulted from bedding and backfill materials which it contends were unsuitable but were used by James throughout the Project to avoid the expense of imported material. (R. 614). James, on occasion, paid for and used import materials for bedding and backfill. (R. 1035; R. 634). James claims that the existing native soils it used as bedding and backfill were unsuitable and that it knew this before it used them. (R. 634). On several occasions, James was told by SLCC inspectors to dry the material if it was too wet or, in the alternative, to import materials. (R. 634).

James Foreman, President of James, interpreted the specifications as not requiring existing materials. (Foreman Deposition, p. 40, R. 365; R. 634). James Foreman, President of James, admitted that "if the material as prescribed by the

specifications had been used, I don't feel the failures would have existed". (Foreman Deposition, p. 40, R. 365; R. 634).

Response to James' Statement of Facts¹

James' inaccurately contends that SLCC "insisted on James using the excavated material" as bedding and backfill throughout the project. Bill Erickson, James' superintendent, testified in his deposition that James' was free to use import on the project. In fact, Erickson admitted that SLCC inspectors suggested several times that James use import material. (R.634)

James further states that compaction tests were taken by SLCC every 200 feet. In support of this allegation, James cites its own memorandum which refers to page 8 of the deposition of Milt Winward. (R. 654). No mention of this contention is found on Page 8 of Winward's deposition. (R. 361). However, Winward testified on page 28 of his deposition that he did not know how often compaction tests were taken. (R. 361). SLCC inspections were on a random "spot check" basis. (R. 363; R. 634).

James' statement that the engineer who drafted the specifications calculated that 25,000 cubic yards of backfill material would have to be imported is contrary to the undisputed

¹ James sets forth in its Statement of Facts, and throughout its Petition, numerous alleged facts without any reference to the record or source of admissible evidence as required by Rule 46(a)(8), Rules of the Utah Supreme Court. All such allegations should be disregarded by the Court. Dirks v. Goodwill, 81 Utah Adv. Rep. 30 (Ct.App. 1988).

facts. With respect to the amount of import which would be used, the engineers designing the project did not know if any import material would be used on the project. (R.358).

ARGUMENT

POINT I

REVIEW BY THIS COURT OF THE DECISION OF THE COURT OF APPEALS IS UNWARRANTED UNDER THE RULES OF THIS COURT WHERE NO SPECIAL OR IMPORTANT REASONS EXIST FOR SUCH REVIEW.

Rule 42 of the Rules of the Utah Supreme Court provides that review by writ of certiorari is only appropriate in limited cases where special and important reasons exist:

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore.

(Emphasis added). James has not shown that any important or special circumstances exist warranting review. At best, all James has shown is that it disagrees with the Court of Appeal's decision interpreting the express provisions of the Contract between the parties.

The crux of all James' arguments for review is that there is an issue of fact concerning James' claim that SLCC breached the Contract with respect to the bedding and backfill materials and inspection of the Project. (James' Petition, pp. 12,14,15). James, however, made no showing of an issue of fact by affidavit or otherwise. Furthermore, in order for SLCC to have breached the Contract as claimed by James, SLCC must have had an obligation under the Contract for the backfill materials and inspection. The

Contract, however, clearly provides that James was responsible for the backfill material and proper performance of the work and SLCC owed no duty to inspect the work to assure James was doing what it was paid to do. SLCC, therefore, could not be in breach under the Contract, as a matter of law.

James contends that the Court of Appeals failed to consider this point on appeal and that the decision of the Court of Appeals was in conflict with decisions of this Court. As discussed below, however, the Court of Appeals did consider all the arguments raised by James and rendered its decision in accordance with well established principles of law under the decisions of this Court. Under these circumstances, and in the absence of important and specials reasons for review, James' Petition must be denied.

POINT II

THE COURT OF APPEALS CONSIDERED ALL THE RELEVANT AND PRIMARY POINTS PRESENTED ON APPEAL AND PROPERLY ENTERED ITS OPINION IN ACCORDANCE WITH UTAH LAW AND THERE IS NO REASON WARRANTING REVIEW BY THE SUPREME COURT.

James contends that the Court of Appeals failed to consider James' argument that there is an issue of fact as to whether SLCC breached the contract for alleged failure to provided adequate backfill materials and to inspect the project. The Court of Appeals, however, did address this issue and determined that it did not affect the Court's opinion. It is important to note that James offered no affidavit or any other matter creating an issue of fact regarding these matters. The only issue was a question of law whether, under the terms of the Contract, James or SLCC was

responsible for the backfill materials and whether SLCC owed a duty to James to inspect James' work.

James bases its claim of breach by SLCC upon provisions in the Contract relating to selection of backfill materials and inspection of the Project. The Court of Appeals specifically addressed this issue on page 4 of the Opinion:

Contractor relies upon provisions of the contract pertaining to such things as the process of selecting backfill material and City's right to inspect the project. These provisions do not affect those set out above. Under the unambiguous wording of the parties' agreement, Contractor was not entitled to recover any of the damages claimed in its complaint.

When James' contentions are considered in light of the Contract provisions and undisputed facts, it is clear that SLCC was not in breach and that James' arguments, as stated by the Court of Appeals, do not affect the dismissal of James' Complaint. SLCC could not be in breach of the Contract with respect to backfill materials or inspection because under the Contract, James was responsible for the backfill materials and SLCC owed no duty to James to inspect James' work.

James was responsible under the Contract to furnish the materials on the Project which would yield a result in conformance with the Specifications. SLCC, therefore, could not be in breach for failure to do what it was paying James to do. Section 3.01 of the Contract provides:

The Contractor shall furnish all materials required to complete the work Only materials conforming to the requirements of the specifications shall be incorporated in the work. (Emphasis added)

Addendum 1, Part 2, Section 195.01 of the Contract

specifically provides that SLCC was not responsible for the bedding and backfill for the Project.

(b) All materials will be furnished by the owner except for the following: concrete, reinforcing steel, ladders, bedding, backfill, surface restoration and erosion control items.... (Emphasis Added).

Furthermore, Section 201.04(c)(1) provides:

[i]mported select backfill shall be included in payment for installation of the pipe.

Sections 195.02(a) and 195.02(b) of Addendum 1 both include the following provision that payment to James for installation of the pipe includes payment for "bedding, backfill" and for "imported backfill".

Payment per lineal foot of pipe shall be full compensation for.... Also included in payment per lineal foot of pipe shall be all materials and installation of unclassified excavation, bedding, backfill, imported backfill, removal and disposal of waste material...

(Emphasis Added).

James agreed to furnish, and was paid to furnish, suitable bedding and backfill material on the Project. It is undisputed that James failed to do this. (R. 365; R. 634). Only an artificial and unrealistic reading of these contract provisions would support the argument that SLCC was responsible to furnish what James was being paid to furnish. SLCC, therefore, as a matter of law was not in breach of the Contract.

James further claims SLCC breached the contract by failing to discover the defective work while it was being performed and that failure to discover James' defective workmanship relieves James of responsibility for those defects. (R. 2, 180). James claims that

SLCC, and not James itself, was responsible to make sure James was doing what it was paid to do. However, numerous provisions of the Contract make it clear that James, and not SLCC, was responsible for the proper performance of the work.

Section 140.02(b), provides:

The presence of the engineer or any inspector(s), however, shall not relieve the contractor of the responsibility for the proper execution of the work in accordance with all requirements of the Contract Documents. Compliance is a duty of the contractor, and said duty shall not be avoided by any act or omission on the part of the engineer or any inspector(s). (Emphasis Added)

Section 2.07 (d) of the Contract provides:

It is hereby agreed that the inspection by the engineer shall not relieve the contractor of contractor's responsibility to furnish materials and workmanship in accordance with the specifications. (Emphasis Added)

The Contract further provides that SLCC owed no duty to James' to inspect the work to ensure compliance with the Specifications.

Section 2.19 (a) of the Contract provides:

Neither engineer's authority to act under this article or elsewhere in the contract documents nor any decision made by engineer in good faith either to exercise or not exercise such authority shall give rise to any duty or responsibility of engineer to contractor . . . or any other person performing any of the work.

Section 2.07 of the Contract further provides that inspection by the engineer or his assistants was purely at the convenience of the engineer. Furthermore, under Work in the Public Way, page RW-8 of the Contract provides that "testing" by SLCC was optional:

The Engineer has the option to perform any laboratory and field testing to assure compliance with City specifications.

Section 140.04 of the Contract provides that the engineer may

waive any testing or inspection and that any such waiver does not release the contractor of its obligation to perform its work within the Specifications. Section 140.05 (a) of the Specifications provides in pertinent part:

If the engineer or inspector, through an oversight or otherwise, has accepted materials or work which is defective or which is contrary to the specifications, such material, no matter in what stage or condition of manufacture, delivery, or erection, may be rejected by the engineer for the owner.

Section 4.11 of the Contract provides:

No inspection by the engineer or an inspector, no payment of money, acceptance of part or all of the work by City or its agents shall operate as a waiver of any provision of the Contract.

Section 2.08 of the Contract further provides that James, and not SLCC or its agents, was responsible for the manner of performing the work in meeting specification requirements.

(a) The Inspector shall in no case act as foreman or perform other duties for the contractor or interfere with the management of the work by the latter. Any advice which the inspector may give the contractor shall not be construed as binding on the engineer in any way or in any way releasing the contractor from fulfilling all of the terms of the contract.

The above provisions plainly manifest that James' responsibility for the work and materials on the Project was unaffected by any alleged improper or deficient inspection by SLCC. The Contract provisions allowing for inspection and testing were solely for SLCC's own convenience and benefit, Epperly v. City of Seattle, 399 P.2d 591 (Wash. 1965), and do not relieve James from its responsibility to ensure that the work and materials used were in conformance with the Specifications. Fortec Constructors v.

United States, 760 F.2d 1288 (Fed.Cir. 1985); City of Durham v. Reidsville Engineering Company, 255 N.C. 98, 120 S.E.2d 564 (1961). SLCC, therefore, could not be in breach of the Contract as claimed by James.

James cites two cases relating to alleged liability of SLCC "for specifying materials that were not suitable for the construction project."² Both these cases involve misrepresentations in specifications by the project owner that certain materials were suitable but were subsequently determined to be unsuitable. This case does not involve specifications for unsuitable materials. James simply did not do what the specifications required James to do. In fact, James Foreman, President of James admits that "if the material as prescribed by the specifications had been used, I don't feel the failures would have existed." (R. 365; 364).

The Court of Appeals considered all these provisions and correctly determined that James' claims of total breach by SLCC do not affect the Court's ruling. No issue of fact was raised. The only issue was a question of law as to the meaning of the Contract regarding backfill and inspection. The Court of Appeals correctly determined that SLCC was not in breach of the Contract under these

² On April 2, 1990, shortly before this Brief was due, James submitted a letter citing two cases as "supplemental authorities". The cases cited are Thorn Construction Co. v. Utah Dept. of Transportation, 598 P.2d 365 (1979), and Jack B. Parson Construction Co. v. State of Utah, 725 P.2d 614 (Utah 1986). Such submission, however, is improper under the Rules of the Utah Supreme Court. In any event, these cases have no application to this action.

provisions. No reason exists, therefore, for review of this matter under the Rules of the Utah Supreme Court.

POINT III

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS PROPERLY AFFIRMED THE PARTIAL SUMMARY JUDGMENT.

James' second argument for review is that the Court of Appeal's decision is contrary to the decisions of this Court. The real thrust of this argument is James' contention that there is an issue of fact concerning the alleged breach of contract by SLCC. As discussed above, however, James raised no issue of fact, by affidavit or otherwise, with respect to these issues. The only issues presented involved the interpretation, as a matter of law, of the Contract provisions placing responsibility for the work on James. The Court of Appeals' decision is based upon the unambiguous provisions of the Contract and established legal principles under the decisions of the Utah Supreme Court.

James' claims that if SLCC was in breach of the Contract, then James is entitled to ignore the Contractual provisions specifying James' available remedies and recover more than the Contract allows under quantum meruit.³ None of the cases cited by

³ This argument assumes a breach of the Contract by SLCC. As pointed out above, SLCC was not in breach, and could not be in breach as claimed by James, under the express provisions of the Contract.

It is further significant to note that James did not claim any recovery for quantum meruit until SLCC moved to dismiss James' Complaint, after four years of litigation and extensive discovery. In any event, James has never claimed any recovery under any legal theory other than for the specific items of delay and repairs which are precluded by the Contract.

James support this proposition. Furthermore, James has never claimed any amounts, in quantum meruit or otherwise, other than for the specific items of alleged "extra work" consisting solely of claims for delay, stand-by time, construction sequence changes, and repair of defects in its work. (R.2, 1033, 573-609). This is the entire claim of James. (R. 610). The Contract specifically precludes recovery by James for each of these items and precludes recovery for any extra work without an written extra work order, which undisputedly was not present in this case.

James now contends, in an attempt to circumvent the express provisions of the Contract, that it is entitled to recover in quantum meruit. None of the cases cited by James in its Petition stand for this proposition. To the contrary, under Utah law, no recovery is permitted under quantum meruit where an express contract was in effect between the parties.

Quantum meruit is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some reason, would not be able to sue on an express contract. Recovery under quantum meruit presupposes that no enforceable written or oral contract exists.

Davies v. Olson, 746 P.2d 264 (Utah App. 1987). It is undisputed that the parties entered into an express written contract which is the basis of this lawsuit. Quantum meruit, therefore, is inapplicable.

Utah law is well settled that the remedies or damages available to a party to a contract are governed by the provisions of the contract. Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042 (Utah 1984). In Highland, the Court denied recovery

under quantum meruit on a construction project where an express contract existed between the parties. The plaintiff sought recovery for extra work under quantum meruit because no written extra work order had been issued for the alleged extra work. In denying recovery, the Court stated:

Under Utah law damages are controlled by the contractual remedies fashioned by the parties unless it can be shown that the work was so different from the work contemplated by the contract that additional recovery in quantum meruit is warranted. In this case, there was a contract clause requiring Highland to submit all proposed extra work in the form of written change orders so that a contractual remedy existed under an express contract.

Similarly, James is not entitled to recover for items expressly precluded by the Contract between the parties. This is James' entire claim. The Court of Appeals, therefore, correctly ruled that the Contract between the parties controls the remedies available and dismissed the Complaint under the Contract provisions precluding each of the specific items of recovery sought by James.

The vast majority of the amount claimed by James is for delays, standby time, and construction sequence changes⁴. The Contract, however, clearly precludes recovery for such items. The Contract provides that in the event of delay due to any cause, including delays caused by SLCC, James may be entitled to an extension of time to complete the work but in no case would be entitled to recover any monetary damages.

⁴ The total claim of James is in the amount of \$526,843.08. \$427,601.23 of this amount is claimed for "delays" and "construction sequence changes." (R. 573-583).

Section 5.06 of the Contract provides:

The Contractor shall not be entitled to any claim for damage on account of hindrance or delay from any cause whatsoever, but if it can be shown to have affected work on the critical path, Contractor shall be granted extensions of time for which liquidated damages will not be claimed by the City, for delays due to strikes, lockouts, war, fire, or acts of God.

(b) The Contractor shall, within forty-eight (48) hours from the beginning of any such delay, notify the City in writing of the delay and its cause, and request a specific period of contract time extension. In no event shall City be liable for or Contractor be entitled to any damages for any such delay. (Emphasis Added)

Such clauses are routinely enforced under Utah law. Western Engineers, Inc. v. State Road Commission, 20 Utah 2d 294, 437 P.2d 216 (1968); Russell v. Bothwell & Swaner Co., 57 Utah 2d 363, 194 P. 1109 (1920); Corp. of Pres. of LDS v. Hartford Acc. & Ind. Co., 98 Utah 297, 95 P.2d 736 (1940).

The Utah Supreme Court has held that a time extension under such provisions is the contractor's exclusive remedy:

This Court has previously held that when parties to a contract foresee the possibility of delay and provide therefor by extensions of time, it is to be presumed that the parties intended such prescribed remedy to be exclusive for such delay...

Western Engineers, Inc. v. State Road Commission, 20 Utah 2d 294, 437 P.2d 216, 217 n.2 (1968).

James' claim for delays due to "construction sequence changes for the convenience of the City" is expressly precluded by Section 101.09(b) of the Contract:

The Owner reserves the right to determine the sequence of construction which may be most opportune to the Owner.

See also Section 101.07. Section 2.13(c) provides that the City may direct the contractor to coordinate the work with other contractors without liability for damages. It is well established that a contractor cannot recover any damages for delay under contract provisions such as these which provide that the contractor perform the work in the sequence required or directed by the owner. McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966); Southern Fireproofing Co. v. R. F. Ball Const. Co., 334 F.2d 122 (8th Cir. 1964); DePuy v. Lone Star Dredging Co., 162 S.W. 161 (Texas 1942).

SLCC cannot be held liable for damages for the exercise of rights expressly granted under the contract even if its actions did cause some delay or downtime to James. McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966). The Court of Appeals, therefore, was correct in ruling that James cannot recover the amounts claimed for "delay", "construction sequence changes", or "stand-by" time.

The remainder of James claim is for repairs of defects in its work including excessive settlement and "sink holes" in the trench and repair of utilities damaged by James. (R. 573). The Contract, however, required James to make such corrections and repairs at its own expense. James, therefore, is not entitled to such recovery.

Section 4.08 of the General Provisions provides that:

...until the formal acceptance of the work by the city, the contractor shall have the charge and care thereof and shall bear the risk of injury or damage to any part thereof by the acts of God or the elements or from any other cause. The Contractor shall rebuild, repair and restore, and make good all injuries or

damages to any portion of the work occasioned by any of the above causes before final acceptance and shall bear the expense thereof. (Emphasis Added)

Section 2.10 of the General Provisions provides that James shall correct all defects in the work and that "no compensation will be allowed for such correction". Section 2.07(d) further provides that defective work "shall be corrected immediately at the contractor's sole expense".

Section 190.04 of the Contract Specifications, places on James the responsibility for repairing excessive settlement of backfill without additional cost to SLCC. Section 160.04 further provides:

In the event any utilities, service connections, or other improvements are damaged, they shall be repaired at no additional expense to the Owner.

These sections place on James the responsibility to perform remedial work at its own expense. The Court of Appeals correctly affirmed the dismissal of James' claims for these items.

James characterizes the entire amount alleged in its Complaint as "Extras". The Contract, however, provides that payment for "extra work" may only be made when there is a written order for such work. This requirement coincides with Utah Code Ann., Section 63-56-1 (1953 as amended) which precludes payment for extra work on public projects without a written extra work order. James admits that there are no written extra work orders for which James has not been paid in full by SLCC. (R. 610)

Section 6.02 of the General Provisions provides:

No extra work shall be performed or paid for without a written order for such work.

Article 10 of the Contract further provides that:

It is understood and agreed by the parties hereto that no money will be paid to the contractor for any new or additional labor or materials furnished, as defined in Section GP 6.02, unless a new contract or a modification hereof for such additional materials or labor has been made in writing and executed by City and Contractor.

Section 2.10(c) further provides that "... any extra work done without written authority, will be considered as unauthorized and no payment will be made therefor." James obtained no approval or written orders for the payments it seeks and did not make such claim until after its defective work was discovered. (R. 573-609). James, therefore, is not entitled to payment under its claim for extra work without "a written order for such work" authorizing such payment. Huber and Roland Construction Co. v. City of South Salt Lake, 7 Utah 2d 273, 323 P.2d 258 (1958); Campbell Building Company v. State Road Commission, 95 Utah 242, 70 P.2d 857 (1937).⁵

In Darrell J. Didericksen & Sons v. Magna Water, 613 P.2d 1116 (Utah 1980), the Utah Supreme Court held that similar contract language "...placed the onus upon the Contractor to obtain change orders or proceed further at its own risk." Id. at 1118. The absence of written extra work orders, therefore, precludes any recovery by James on its extra work claim and sustains the dismissal of James' Complaint.

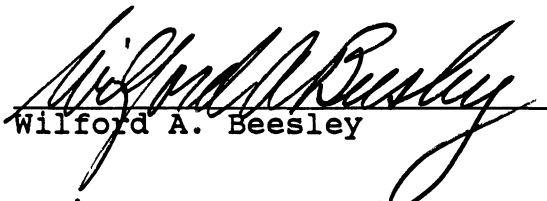
⁵ James' letter citing "supplemental authority" refers to Thorne Const. Co., Inc. v. Utah Dept. of Transp., 598 P.2d 365 (Utah 1979). In that case an extra work claim was allowed where the project engineer had expressly promised to pay the contractor for the extra work. In this case, it is undisputed that SLCC never approved or agreed to pay any of the amounts claimed by James.

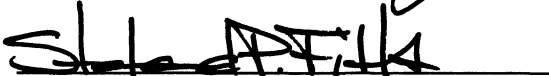
CONCLUSION

No important or special reasons exist for review of the decision of the Court of Appeals. The Court of Appeals fully considered each of the arguments of James and correctly applied established Utah law to the express provisions of the Contract. The Court of Appeals properly affirmed the Partial Summary Judgment and this decision should not be disturbed. SLCC, therefore, respectfully requests that James' Petition for Writ of Certiorari be denied.

Dated this 11th day of April, 1990.

BEESLEY & FAIRLCOUGH


Wilford A. Beesley


Stanford P. Fitts

CERTIFICATE OF SERVICE

I certify that I caused four true and correct copies of the foregoing to be mailed, United States Mail, first class, postage prepaid, to the following this 11th day of April, 1990:

Bryce E. Roe, Esq.
FABIAN & CLENDENNIN
215 South State Street, Suite 1200
Salt Lake City, Utah 84111

Deirda Beesley

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES CONSTRUCTORS, INC.,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-84-2857
vs.	:	
SALT LAKE CITY CORPORATION,	:	
Defendant.	:	

SALT LAKE CITY CORPORATION, a	:	
municipal corporation of the	:	
State of Utah,	:	

Plaintiff,	:	
------------	---	--

vs.	:	
-----	---	--

JAMES CONSTRUCTORS, INC., a	:	
Nevada corporation, et al.,	:	

Defendants.	:	
-------------	---	--

:

The above-entitled matter came on for the Court's consideration on the defendant, Salt Lake City Corporation's Motion for Partial Summary Judgment. The matter was set on the Court's Law and Motion calendar April 11, 1988. Salt Lake City Corporation was represented by Wilford A. Beesley and Stanford P. Fitts. Defendants James Constructors and Hood Corporation were represented by Jay E. Jensen and C. Reed Brown, and defendant Industrial Indemnity Company was represented by David Reeve. The

Court considered the Motions and accompanying Memoranda. heard the arguments of counsel, and based upon the foregoing renders this

MEMORANDUM DECISION

The undisputed facts are as follows:

1. On or about July 8, 1983, Salt Lake City Corporation and James Constructors entered into a contract for the construction of a water pipeline known as the Big Cottonwood Conduit Extension - Terminal Park Transmission Pipeline. The contract was number 35-4184.

2. While plaintiffs James Constructors, Inc. deny that their work was defective, there can be no dispute that defects were observed and demands for corrections were rendered by Salt Lake City Corporation.

3. In March and April of 1984 Salt Lake City Corporation notified James that it would terminate James from the project if the defects were not corrected within ten (10) days.

4. On April 16, 1984, Salt Lake City Corporation notified James of termination from the project.

5. James was paid in full by Salt Lake City Corporation for all written extra work orders issued on the project.

6. James claims it is now entitled to payment from Salt Lake City Corporation in the amount of \$526,843.08 for work it considers extra, consisting of delay damages, standby time damages, construction sequence changes and work repair defects in the project, and damages associated with each. The breakdown of these damages consists of the following:

a. \$427,601.23 claimed as extra work for delays, construction sequence changes, and standby time costs.

b. \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items.

c. \$6,542.88 for demobilization costs relative to James' termination from the project.

d. An undetermined amount for lost profits to James.

7. James bases its extra work claim upon letters from James to Salt Lake City Corporation, dated March 7, 1984, March 16, 1984, April 16, 1984, and April 19, 1984.

8. James admits that the cost of completing the project, had James remained on the job, would involve speculation.

9. While James contests the suitability of the trench bedding and the responsibility for its selection, it is

undisputed that the bedding, for whatever reason, including the failure to appropriately cradle the pipeline, failed.

10. Salt Lake City Corporation claims that James Constructors, Inc. was not appropriately licensed, which is disputed by James Constructors, and appears to this Court to be an issue that could be verified through counsel, and if the license had been appropriately obtained but in a dba or an erroneous name, so long as it applied to the plaintiffs, should moot the issue and the Court will not consider the issue to be a substantive defect.

11. James Constructors stated certain additional facts which it claimed to be undisputed, and which Salt Lake City claimed were not germane to the issues involved in the present motions.

ISSUES AND RULING

1. Salt Lake City Corporation alleges that the contract requires James to select the bedding and backfill materials as necessary to comply with the requirements of the specifications of the contract. The Court finds that the language of the contract is unambiguous and clear in that section 3.01 of the contract provides, "The contractor shall furnish all materials required to complete the work. . . ." and in addendum 1, part 2,

section 195.01 the contract further states that "all materials. . . . " would be provided by the owner, except for ". . . bedding, backfill," Thus, James was clearly responsible for providing the appropriate bedding, whether native or import, to complete the project.

2. The obligation of James to construct the pipeline in conformance with the contract specifications was not modified, waived or relieved in any respect. James argues that the inspectors on the job site would not allow James to utilize import materials for the bedding, but indicated that the native materials were satisfactory. This Court finds that when James was responsible to "furnish materials and workmanship in accordance with the specifications" that James was responsible to see that the result was satisfactory and could not transfer to the inspector responsibility for the result if the inspector indicated that in his opinion native material was satisfactory and import was not necessary. If James disagreed, certainly the inspector would not object to the utilization of import material at James' request.

3. The contract specifically states in section 2.08 "The inspector shall in no case act as foreman or perform other duties for the contractor, nor interfere with the management of the work

by the latter. Any advice which the inspector may give the contractor shall not be construed as binding on the engineer in any way, or in any way releasing the contractor from fulfilling all of the terms of the contract."

Thus, the Court finds the contractor responsible for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory.

4. The Court finds that James is not entitled under the contract or outside the contract for recovery of damages associated with construction sequence changes. In paragraph 5.06 of the contract it expressly provides, "The contractor shall not be entitled to any claim for damage on account of hindrance or delay from any cause whatsoever. . . . " The contractor has thus agreed not to be entitled to raise such claims.

5. James is further not entitled to payment for extra work, because section 6.02 of the contract states, "No extra work shall be performed or paid without a written order for such work." Thus, as section 2.10(c) of the contract states, ". . . any extra work done without written authority will be considered as unauthorized, and no payment will be made therefore." James has no basis for such claim.

6. James was obligated within the agreement to repair defects, including settlement of backfill, damages to utilities, and damaged pipe at its own expense. Thus, the \$92,698.97 for repairs requested by James are excluded by the contract. Section 4.08 of the contract states, "The contractor shall rebuild, repair and restore and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance, and shall bear the expense thereof." Paragraph 2.10 specifically states that if the contractor is required to make such repairs, "no compensation will be allowed for such correction."

7. James is not entitled to any recovery for lost profits, because such are uncertain, contingent, conjectural and speculative in nature, and not allowed.

CONCLUSION

The Court therefore concludes that the Motion for Summary Judgment filed by Salt Lake City Corporation should be and the same is granted. Salt Lake City Corporation's counsel is instructed to prepare Findings of Fact, Conclusions of Law, and

JAMES V. SALT LAKE CITY

PAGE EIGHT

MEMORANDUM DECISION

Judgment consistent with this Memorandum Decision, and submit them to counsel in harmony with the Local Rules.

Dated this 13 day of April, 1988.

/s/
DAVID S. YOUNG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 14 day of April, 1988:

Wilford A. Beesley
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Attorneys for Salt Lake City Corporation
40 E. South Temple, Suite 310
Salt Lake City, Utah 84111

C. Reed Brown
Attorney for James Const. & Hood Corp.
3450 Highland Drive, Suite 301
Salt Lake City, Utah 84106

Jay E. Jensen
Elwood P. Powell
Co-counsel for James Const. & Hood Corp.
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David A. Reeve
Attorney for Industrial Indemnity
175 S. Main, Suite 1300
Salt Lake City, Utah 84111

Max D. Wheeler
David W. Slaughter
Robert C. Keller
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

E. P. Fitts

APPENDIX B

IN 11988
C. J. Carter

WILFORD A. BEESLEY #0257
STANFORD P. FITTS #4834
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40 East South Temple Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2100

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES CONSTRUCTORS, INC., :
 :
Plaintiff, : FINDINGS OF FACT AND
 : CONCLUSIONS OF LAW
vs. :
 :
SALT LAKE CITY CORPORATION, :
 :
Defendant. :
 :
_____ :
SALT LAKE CITY CORPORATION, :
a municipal corporation of :
the State of Utah, :
 :
Plaintiff, : Civil No. C-84-2857
vs. :
 :
JAMES CONSTRUCTORS, INC., : Judge David S. Young
a Nevada corporation, HOOD :
CORPORATION, a California :
corporation, and INDUSTRIAL :
INDEMNITY COMPANY, a :
California corporation, :
 :
Defendants. :

Judgment in the above-entitled matter came on regularly for the Court's consideration on April 11, 1988 at 10:00 a.m., the Honorable David S. Young presiding. Salt Lake City Corporation was represented by Wilford A. Beesley, Esq. and Stanford P. Fitts, Esq.. James Constructors, Inc. was represented by Jay E. Jensen, Esq. and C. Reed Brown, Esq.. Hood Corporation was represented by David Reeve, Esq.. Industrial Indemnity Company was represented by David W. Slaughter, Esq.. The Court having considered the Memoranda and Exhibits submitted by the parties, having heard the arguments of counsel, and being fully advised in the premises, hereby enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACTS

1. On or about July 8, 1983, Salt Lake City Corporation and James Constructors, Inc. ("James") entered into a contract for the construction of a water pipeline known as the Big Cottonwood Conduit Extension - Terminal Park Transmission Pipeline. The contract was number 35-4184.

2. While plaintiffs James Constructors, Inc. denies that it is responsible for settlement of the trench, damage to the pipe, or other defects in the work, it is undisputed that defects were observed and demands for corrections were rendered by Salt Lake City Corporation.

3. In March and April of 1984 Salt Lake City Corporation

notified James that it would terminate James from the project if the defects were not corrected within ten (10) days.

4. On April 16, 1984, Salt Lake City Corporation notified James of termination from the project.

5. James was paid in full by Salt Lake City Corporation for all written extra work orders issued on the project. No written extra work orders exist for any of the extra work claimed by James in its Complaint.

6. In its Complaint, James claims, based upon letters from James to Salt Lake City Corporation, dated March 7, 1984, March 16, 1984, April 16, 1984, and April 19, 1984, that it is entitled to extra payment from Salt Lake City Corporation in the amount of \$526,843.08 for work consisting of delay damages, standby time, construction sequence changes and work repairing defects in the project, and damages associated with each. The breakdown of these damages consists of the following:

- a. \$427,601.23 claimed as extra work for delays, construction sequence changes, and standby time costs.
- b. \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items.
- c. \$6,542.88 for demobilization costs relative to James' termination from the project.
- d. An undetermined amount for lost profits

to James.

7. James admits that the cost of completing the project, had James remained on the job would involve speculation.

8. While James contests the suitability of the native soils for trench bedding and backfill and the responsibility for its selection, it is undisputed that some of the bedding and backfill failed, for whatever reason.

CONCLUSIONS OF LAW

1. James Constructors, Inc. was required under the Contract with Salt Lake City Corporation to provide either select materials from native soils or to furnish proper import materials, at its own expense as part of its unit price per lineal foot of pipe installed, to achieve necessary compaction of the bedding and backfill for the pipe and to prevent settlement as required by the Specifications.

2. Inspection by Salt Lake City inspectors or any alleged failure to adequately inspect the work performed by James did not modify, waive, or relieve James Constructors, Inc. from constructing the pipeline in conformance with the Contract Specifications. Salt Lake City had no duty under the Contract to inspect the project for the benefit of James Constructors, Inc. and the occurrence, adequacy or extent of any inspection by SLCC is irrelevant and immaterial to any of the issues in the case.

3. James Constructors, Inc. was responsible under the Contract for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory. Any advice which James Constructors, Inc. may have received from SLCC inspectors is not binding on the SLCC engineer in any way and does not in any way release James Constructors, Inc. from fulfilling all of the terms of the Contract.

4. The extra work claims in James Constructors, Inc.'s Complaint were not the subject of written extra work orders authorized by Salt Lake City Corporation as required by the Contract documents, and James Constructors, Inc. is not entitled to payment for extra work claims alleged in its Complaint.

5. James Constructors, Inc. is not entitled to any recovery under or outside the Contract for any delay damages, stand-by time, construction sequence changes or other hindrances, however caused, in the prosecution of the work.

6. The Contract between Salt Lake City Corporation and James Constructors, Inc. required James Constructors, Inc. to repair defects in the project, including settlement of bedding or backfill, damage to utilities, or damage to pipe, at its own expense and without any additional compensation from Salt Lake City Corporation.

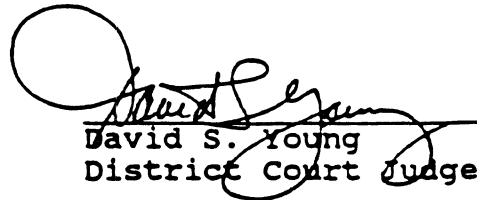
7. James Constructors, Inc. is not entitled to any recovery for lost profits.

8. James Constructors, Inc.'s Complaint in this matter

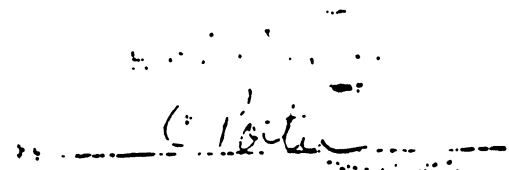
should, as a matter of law, be dismissed with prejudice.

Dated this 1ST day of ~~May~~^{June}, 1988.

BY THE COURT:



David S. Young
District Court Judge



CERTIFICATE OF SERVICE

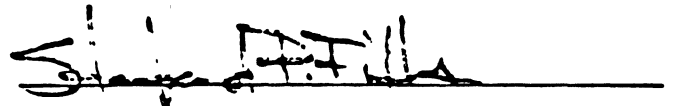
I certify that I caused a true and correct copy of the foregoing to be HAND DELIVERED to the following this 16th day of May, 1988:

C. Reed Brown, Esq.
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3450 Highland Drive, Suite 301
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Elwood P. Powell, Esq.
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David A. Reeve, Esq.
ARMSTRONG, RAWLINGS & WEST
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Salt Lake City, Utah 84111

Max D. Wheeler, Esq.
David W. Slaughter, Esq.
Robert C. Keller, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145

A handwritten signature, likely of the certifier, is written in dark ink over a horizontal line. The signature is stylized and appears to be "S. J. Jensen".

APPENDIX C

WILFORD A. BEESLEY #0257
STANFORD P. FITTS #4834
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Telephone: (801) 538-2100

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES CONSTRUCTORS, INC.,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

SALT LAKE CITY CORPORATION,
a municipal corporation of
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,
a Nevada corporation, HOOD
CORPORATION, a California
corporation, and INDUSTRIAL
INDEMNITY COMPANY, a
California corporation,

Defendants.

:

:

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ORDER OF PARTIAL
SUMMARY JUDGMENT

Civil No. C-84-2857

Judge David S. Young

Pursuant to the Findings of Fact and Conclusions of Law, and
pursuant to the Memorandum Decision entered with respect to Salt

Lake City Corporation's Motion for Partial Summary Judgment in the above entitled matter, the Court hereby Orders that:

1. Salt Lake City Corporation's Motion for Partial Summary Judgment is hereby granted and the Complaint of James Constructors, Inc. in this matter is hereby dismissed with prejudice.

2. James Constructors, Inc. was required under the Contract with Salt Lake City Corporation to provide either select materials from native soils or to furnish proper import materials, at its own expense, as part of its unit price per lineal foot of pipe installed, to achieve necessary compaction of the bedding and backfill for the pipe and to prevent settlement as required by the Specifications.

3. Inspection by Salt Lake City inspectors or any alleged failure to adequately inspect the work performed by James did not modify, waive, or relieve the responsibility of James Constructors, Inc. to construct the pipeline in conformance with the Contract Specifications. Salt Lake City had no duty under the Contract to inspect the project for the benefit of James Constructors, Inc. and the occurrence, adequacy or extent of any inspection by SLCC is irrelevant and immaterial to any of the issues in this lawsuit.

4. James Constructors, Inc. was responsible under the Contract for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory. Any advice

APPENDIX D

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

FILED

JAN 19 1990
[Signature]

James Constructors, Inc.,)
)
Plaintiff and Appellant,)
v.)
)
Salt Lake City Corporation,)
)
Defendant and Respondent.)
-----)
Salt Lake City Corporation,)
a municipal corporation of the)
State of Utah,)
)
Plaintiff,)
)
v.)
)
James Constructors, Inc., a)
Nevada corporation; Hood)
Corporation, a California)
corporation; and Industrial)
Indemnity Company, a)
California corporation,)
)
Defendants.)

OPINION
(Not For Publication)

Case No. 880502-CA

Third District, Salt Lake County
The Honorable David S. Young

Attorneys: Bryce E. Roe, Salt Lake City, for Appellant
Wilford A. Beesley and Stanford P. Fitts, Salt
Lake City, for Respondent

Before Judges Davidson, Bench, and Jackson.

BENCH, Judge:

James Constructors, Inc. (Contractor) appeals the entry of a partial summary judgment in a suit on a construction contract. We affirm.

Contractor entered into an agreement with Salt Lake City (City) for the construction of a municipal water pipeline. After some pipe had been installed, City discovered and notified Contractor of certain defects in the project, including the excessive settlement of trenches. When the defects were not corrected, City terminated the contract. Contractor filed a complaint seeking damages for wrongful termination of the contract. City filed its own complaint wherein it sought damages to cover the costs of repairing the defects and completing the project. The two actions were consolidated by district court order.

After extensive discovery, City moved for summary judgment on Contractor's complaint. The district court granted the motion. Although City's action against Contractor was still pending, the court certified the partial summary judgment as appealable under Utah R. Civ. P. 54(b).

The district court held that, based on the clear and unambiguous language of the contract, City was entitled to summary judgment on Contractor's complaint. Generally, in reviewing a summary judgment, "we inquire whether there is any genuine issue as to any material fact and, if there is not, whether the moving party is entitled to judgment as a matter of law." Arrow Indus. v. Zions First Nat'l Bank, 767 P.2d 935, 937 (Utah 1988). "Contract interpretation 'may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent.'" Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988) (quoting Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985)). Whether ambiguity exists in a contract is a question of law which we review for correctness. See Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). "When a contract is unambiguous, its interpretation is [also] a question of law." Wilburn v. Interstate Elec., 748 P.2d 582, 584 (Utah Ct. App. 1988), cert. dismissed, 774 P.2d 1149 (Utah 1989).

In its complaint, Contractor alleged that City had wrongfully terminated the parties' contract and that, as a result, Contractor had suffered the following damages: (a) \$427,601.23 for delays, construction sequence changes, and standby time costs; (b) \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items; and (c) \$6,542.88 for demobilization costs. The district court held that such claims were precluded under the clear language of the parties' contract. We agree.

Contractor claimed these damages as "extras." The contract contains the following provision: "No extra work shall be

performed or paid for without a written order for such work." If delays, construction sequence changes, standby time costs, and repairs are truly "extras," recovery is available only if City prepared a written order for such work. It is undisputed that no such order was prepared.

In any event, the contract clearly precludes recovery for the specified damages. For example, section 5.06 of the contract provides: "The Contractor shall not be entitled to any claim for damage on account of hindrance or delay from any cause whatsoever In no event shall City be liable for or Contractor be entitled to any damages for such a delay."¹ Section 101.09(b) provides, "The [City] reserves the right to determine the sequence of construction which may be most opportune to the [City]." Section 2.13(c) provides:

If the performance of the Contractor is likely to be interfered with by the simultaneous execution of some other contract or contracts, the [City] may decide which contractors shall cease work temporarily and which contractor shall continue The City shall not be responsible for any damages suffered or extra costs incurred by the Contractor resulting directly or indirectly from the performance or attempted performance of any other contract or contracts.

Section 4.08 provides: "The Contractor shall rebuild, repair and restore, and make good all injuries or damages to any portion of the work occasioned by [the acts of God or the elements or from any other cause] before final acceptance and shall bear the expense thereof." Section 190.04 provides:

Replacement of earth fill or backfill, where it has settled below the required finish elevations, shall be considered as a part of such required repair work
If the Contractor fails to make such repairs or replacements promptly, the

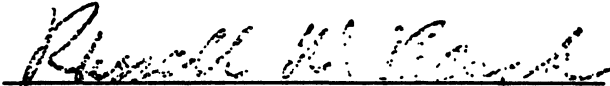
1. In place of damages, the contract provided for extensions to allow Contractor an opportunity to complete the work. See Western Eng'rs, Inc. v. State Rd. Comm'n, 20 Utah 2d 294, 296 n.2, 437 P.2d 216, 217 n.2 (1968) ("when parties to a contract foresee the possibility of delay and provide therefor by extensions of time, it is to be presumed that the parties intended such prescribed remedy to be exclusive for such delay").

[City] reserves the right to do the work and the Contractor and his surety shall be liable to the [City] for the cost thereof.

Contractor relies upon provisions of the contract pertaining to such things as the process of selecting backfill material and City's right to inspect the project. These provisions do not affect those set out above. Under the unambiguous wording of the parties' agreement, Contractor was not entitled to recover any of the damages Contractor claimed in its complaint.

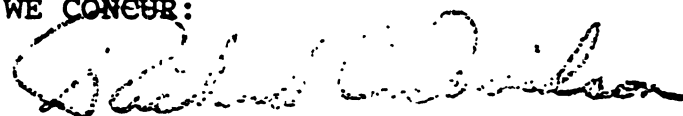
On appeal, Contractor contends that summary judgment is precluded by the existence of disputed issues of material fact relative to alternative theories of recovery such as independent contract, modification, rescission, estoppel, and waiver. These issues were neither pleaded nor presented to the district court and cannot be raised for the first time on appeal. See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988); see also Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984).

The partial summary judgment is hereby affirmed.

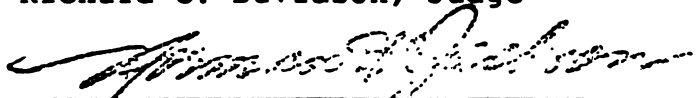


Russell W. Bench, Judge

WE CONCUR:



Richard C. Davidson, Judge



Norman H. Jackson, Judge

COVER SHEET

CASE TITLE:

James Constructors, Inc.
Plaintiff and Appellant,
v.
Salt Lake City Corporation,
Defendant and Respondent.

Case No. 880502-CA

Salt Lake City Corporation,
a municipal corporation of the
State of Utah,
Plaintiff and Respondent,
v.
James Constructors, Inc., a Nevada
corporation, Hood Corporation,
a California corporation, and
Industrial Indemnity Company,
a California corporation,
Defendants and Appellants.

PARTIES:

Bryce E. Roe (Argued)
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215 South State, 12th Floor
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Wilford A. Beesley (Argued)
Stanford P. Fitts
Beesley, Spencer & Fairclough
Attorneys at Law

TRIAL JUDGE:

Honorable David S. Young

January 19, 1990. OPINION. (Not For Publication)

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed.

Opinion of the Court by RUSSELL W. BENCH, Judge; RICHARD C. DAVIDSON, and NORMAN H. JACKSON, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of January, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.



Deputy Clerk

TRIAL COURT:

Third District Court, Salt Lake County, #C84-2857

APPENDIX E

IN THE UTAH COURT OF APPEALS

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James Constructors, Inc.)	ORDER DENYING REHEARING
)	
Plaintiff and Appellant,)	
)	
v.)	Case No. 880502-CA
)	
Salt Lake City Corporation,)	
)	
<u>Defendant and Respondent.</u>)	
)	
Salt Lake City Corporation,)	
a municipal corporation of the)	
State of Utah,)	
)	
Plaintiff and Respondent,)	
)	
v.)	
)	
<u>James Constructors, Inc., a</u>)	
Nevada corporation, Hood)	
Corporation, a California)	
corporation, and Industrial)	
Indemnity Company, a California)	
corporation,)	
)	
Defendants and Appellants.)	

THIS MATTER having come before the Court upon
Appellant's Petition for Rehearing,

IT IS HEREBY ORDERED that the Appellant's Petition for
Rehearing is denied.

Dated this 15th day of February 1990.

FOR THE COURT


Mary T. Noonan, Clerk

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of February, 1990, a true and correct copy of the foregoing ORDER DENYING REHEARING was deposited in the United States mail.

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Stanford P. Fitts
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Honorable David S. Young
District Court Judge
240 East 400 South, Room 504
Salt Lake City, UT 84111

DATED this 16th day of February, 1990.

By


Deputy Clerk